

STATE OF MICHIGAN  
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

MARGARET PHILLIPS, Personal Representative  
of the Estate of REGEANA DIANE HERVEY,  
Deceased,

Plaintiff-Appellant,

S.C. No. 121831

C.A. No. 227257

v

L.C. No. 98-23923-NI-5

MIRAC, INC., a Michigan Corporation,  
Jointly and Severally,

Defendant-Appellee,

and

DA-FEL REED.

Defendant.

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**DEFENDANT-APPELLEE, MIRAC, INC.'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

**THE APPEAL INVOLVES A RULING BY THE COURT OF APPEALS THAT A  
PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR  
OTHER STATE GOVERNMENTAL ACTION IS VALID**

**CERTIFICATE OF SERVICE**

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## **COUNTER-STATEMENT OF THE QUESTION PRESENTED**

WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT MCLA 257.401(3); MSA 9.2101(3), WHICH LIMITS THE STATUTORY VICARIOUS LIABILITY OF PERSONS ENGAGED IN THE BUSINESS OF LEASING MOTOR VEHICLES WHO LEASE MOTOR VEHICLES FOR A PERIOD OF 30 DAYS OR LESS TO \$20,000 PER PERSON/\$40,000 PER ACCIDENT, IS CONSTITUTIONAL?

Defendant-appellee, MIRAC, Inc., answers “yes.”

Plaintiff-appellant answers “no.”

The Court of Appeals concluded that the statute was constitutional and did not violate the Michigan constitutional rights to trial by jury, equal protection and due process.

The circuit court answered that the statute was unconstitutional. Specifically, the circuit court concluded that the statute violated the Michigan constitutional rights to trial by jury, equal protection and due process. The circuit court determined that the statute did not violate the separation of powers provision of the Michigan Constitution. The plaintiff did not file a cross-appeal. No separation of powers issue was before the Court of Appeals. Pursuant to its July 3, 2003 Order, no separation of powers issue is before this Court.

## **STATEMENT OF FACTS**

The following facts are undisputed.

### **A. Background facts.**

This is a wrongful death action arising out of an incident which occurred on October 27, 1997. Regeana Diane Hervey was a passenger in a motor vehicle operated by Da-Fel Reed. On October 25, 1997, Da-Fel Reed had rented the motor vehicle from defendant-appellee, MIRAC, Inc. (MIRAC), doing business as Enterprise Rent-A-Car (Tr, 11/23/99, p 4; Appellee's Appendix, p 8b). MIRAC is engaged in the business of leasing motor vehicles. The Lease Agreement between MIRAC and Ms. Reed provided for the use of the rental car by Ms. Reed for a period of 30 days or less. Plaintiff's claim against MIRAC is based solely on statutory ownership liability of the motor vehicle under MCLA 257.401. The parties stipulated that under Michigan law, MIRAC is responsible for Ms. Reed's authorized operation of the rented vehicle. Plaintiff did not allege that MIRAC was negligent in the leasing of the motor vehicle to Ms. Reed.

### **B. Circuit court proceedings.**

This action was tried to a jury on November 23, 24, 25 and 30, 1999. The jury returned a verdict in favor of the plaintiff. Pursuant to an Agreement between the Parties Regarding Trial, plaintiff filed a motion for entry of judgment in the principal amount of \$250,000. MIRAC filed a motion for entry of judgment in the principal amount of \$20,000, pursuant to MCLA 257.401(3); MSA 9.2101(3). The issue presented by the

parties' cross-motions for entry of judgment was the constitutionality of the cap on recoverable damages set forth in MCLA 257.401(3); MSA 9.2101(3).

Oral arguments on the cross-motions were heard by Saginaw County Circuit Court Judge Leopold P. Borello on March 3, 2000. At the conclusion of the hearing, Judge Borello took the cross-motions under advisement. (Tr, 3/3/00, p 52; Appellee's Appendix, p 11b).

On April 26, 2000, Judge Borello issued an Opinion. (Appellant's Appendix, pp 1a-12a). He determined, first, that even though the Legislature could completely eliminate statutory ownership liability, ". . . the Legislature cannot impose a damage cap on Owner's Liability because such a limitation impedes the constitutional right to a jury trial." (Opinion, p 5; Appellant's Appendix, p 5a).

Next, Judge Borello, focusing on the right to trial by jury rather than on the right to recover damages for personal injury, determined that MCLA 257.401(3) violated the equal protection clause of the Michigan Constitution. (Opinion, pp 8-10; Appellant's Appendix, pp 8a-10a).

Next, Judge Borello determined that MCLA 257.401(3) violated the due process clause of the Michigan Constitution. (Opinion, p 10; Appellant's Appendix, p 10a).

Lastly, Judge Borello determined that MCLA 257.401(3) did not violate the separation of powers provision of the Michigan Constitution. (Opinion, p 10; Appellant's Appendix, p 10a).

**C. Court of Appeals proceedings.**

On May 16, 2000, MIRAC, Inc. timely filed its claim of appeal. Plaintiff did not file a claim of cross-appeal.

Following arguments, the Court of Appeals issued its decision on June 7, 2002. *Phillips v MIRAC, Inc*, 251 Mich App 586; 651 NW2d 437 (2002). The majority, consisting of Judges Hoekstra and Gage, concluded that the statute, MCLA 257.401(3), is constitutional.

The majority held that the statute did not violate the right to trial by jury for two reasons. First, the majority accepted the logical argument that since the Legislature could abolish a cause of action, either common law based or statutory, it can constitutionally limit the damages recoverable under a cause of action. Simply put, the greater power necessarily includes the lesser power. Secondly, the majority addressed the issue concerning the scope or parameters of the right to a trial by jury. The majority concluded that the right to a trial by jury includes only the right to the factual determination of the amount of damages and does not extend to the right to dictate the legal consequences of such a factual determination. In short, the jury determines facts and the Legislature has the constitutional power to set forth the legal consequences thereof.

The last two issues in the case, equal protection and due process, were resolved after the trial by jury ruling. The majority held that the “strict scrutiny” test was not applicable because a fundamental right, the right to trial by jury, was not adversely affected by MCLA 257.401(3). The majority held that just because an issue relating to a

constitutional right is presented in a case does not mandate application of the strict scrutiny test. The majority concluded that the “rational basis” test applied and it was satisfied. The majority stated that the legitimate interest is the continued operation of the automobile rental business in Michigan and that protecting such business from large damage awards is rationally related to that end.

Judge Meter dissented. He stated, wrongly in our view, that the right to trial by jury extends not only to a determination of the amount of damages but also to the legal consequences of such a determination.

**D. Subsequent Court of Appeals cases.**

Following the decision of the Court of Appeals in this case, that Court has issued several opinions deciding the constitutionality of statutory damages caps in other contexts. The decision of the majority in *Zdrozewski v Murphy*, 254 Mich App 50, 75-82; 657 NW2d 721 (2002), the concurrence of Judge Kelly in *Wiley v Henry Ford Cottage Hospital*, \_\_ Mich App \_\_; \_\_ NW2d \_\_; 2003 Mich App Lexis 1663 (2003) (both analyzing the medical malpractice damages cap statute, MCLA 600.1483) and the decision in *Kenkel v The Stanley Works*, 256 Mich App 548; 665 NW2d 490 (2003) (analyzing the damages cap statute set forth in the products liability act, MCLA 600.2946a(1)) all mirror the decision of the majority in the present case. As such, there is not need for a separate discussion of the arguments and analyses in those cases.

## RELEVANT HISTORICAL BACKGROUND

At common law, the owner of a motor vehicle was not liable for damages resulting from its negligent operation by a driver to whom the car had been entrusted. *Hartley v Miller*, 165 Mich 115; 130 NW 336 (1911); *Wieczorek v Merskin*, 308 Mich 145, 148; 13 NW2d 239 (1944).

In 1909, the Legislature enacted Act No. 318 of the Public Acts of 1909. Section 10, subdivision 3 of that Act imposed on the owner of a motor vehicle liability for damages to one who has been injured by the negligent operation of the motor vehicle by any person. *Stapleton v Independent Brewing Co*, 198 Mich 170; 164 NW2d 520 (1917); *Moore v Palmer*, 350 Mich 363; 86 NW2d 585 (1957). Thus, vicarious motor vehicle ownership liability under Michigan law is purely statutory.

Prior to June 22, 1995, the Owners' Liability Statute provided in part as follows:

(1) The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of the motor vehicle whether the negligence consists of a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in the operation of the motor vehicle as the rules of the common law requires [sic]. The owner shall not be liable, however, unless the motor vehicle is being driven with his or her express or implied consent or knowledge.

(2) A person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days shall not be liable at common law for damages for injuries to either person or property resulting from the operation of the leased motor vehicle. MCLA 257.401; MSA 9.2101.

On June 22, 1995, the statute was amended. The amendment added the following subsection:<sup>1</sup>

“(3) Notwithstanding subsection (1), a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period of 30 days or less is liable for an injury caused by the negligent operation of the leased motor vehicle only if the injury occurred while the leased motor vehicle was being operated by an authorized driver under the lease agreement ... Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor’s liability under this subsection is limited to \$20,000.00 because of bodily injury to or death of 1 person in any 1 accident and \$40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.” MCLA 257.401(3); MSA 9.2101(3) (underlining supplied).

According to the legislative history, the impetus behind the 1995 amendments to the Owner’s Liability Act was the Legislature’s concern that companies engaged in the business of leasing motor vehicles were being burdened unfairly under the then-existing unlimited vicarious liability scheme. Set forth in Appellee’s Appendix at pp 1b-3b<sup>2</sup> is a document prepared by the House Legislative Analysis Section which describes the problem which prompted the amendments to the Owner’s Liability statute.<sup>3</sup> As the

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<sup>1</sup> Other subsections which are not at issue here were also added by the 1995 amendment.

<sup>2</sup> The contents of Appellee’s Appendix were submitted to the circuit court as Exhibits to defendant’s brief in support of motion for entry of judgment and response to plaintiff’s memorandum of law dated 12/27/99.

<sup>3</sup> The Court of Appeals has acknowledged the House Legislative Analysis of the 1995 amendment to the Owner’s Liability statute as indicative of the legislative intent. *Black v Joe Panian Chevrolet, Inc*, 239 Mich App 227; 608 NW2d 89 (2000), *lv den* 635 NW2d 35 (2001), *reh den* 641 NW2d 854 (2002).

legislative history sets forth, the Legislature considered testimony about cases in which companies engaged in the business of leasing motor vehicles had been held liable for millions of dollars without any attribution of negligence to those companies. The legislative history notes:

“The bill addresses a peculiar problem faced by the car and truck rental industry. It offers them practical, immediate relief from the threat of catastrophic damage awards from lawsuits under the current law. This is a serious demonstrated business problem for the industry.” (Underling supplied).

Thus, the principal purpose of the legislation was to protect the viability of the short term motor vehicle rental business in the State of Michigan,<sup>4</sup> a business which employs approximately 2,500 Michigan residents and remits annually approximately \$16,500,000 in use taxes and title and registration fees.

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<sup>4</sup> It is noteworthy, although not outcome determinative because the result would be the same even if it was not the case, to acknowledge that application of MCLA 257.401(3) does not eliminate the right of an injured party to recover the entire amount of the damages which the jury finds he or she has sustained from the actual negligent party, the driver of the leased motor vehicle. The liability of one under the ownership liability statute is vicarious only. *Secura Insurance Co v Cincinnati Insurance Co*, 198 Mich App 243; 497 NW2d 230, 232 n2 (1993). The owner is held liable as a matter of policy, but he is not a wrongdoer. The statute, MCLA 257.401(3), merely limits the injured party's ability to collect from the vicariously liable owner of the leased motor vehicle. The injured party retains the right to collect full damages from the actual tortfeasor. The fact that the actual tortfeasor, in this case Da-Fel Reed, may not have sufficient assets to satisfy the full damage award against him or her is irrelevant to the legal questions before this Court.

## **OVERVIEW OF ARGUMENTS**

Regardless of the basis of the constitutional challenge to MCLA 257.401(3), application of the following legal principles and logical propositions mandates the conclusion that the statutory cap on the amount of damages recoverable for vicarious liability from persons engaged in the business of leasing motor vehicles on a short term basis is constitutional.

It is undisputed that the legislature has the power to abolish or abrogate both common law and statutory rights.

It is undisputed that modification, pursuant to statute, of the amount of a jury verdict in determining the amount of recoverable damages is constitutionally permitted. Statutes which multiply a jury determination in order to determine recoverable damages are constitutional. Statutes which reduce a jury determination in order to determine recoverable damages are constitutional.

In Michigan, there are constitutionally permissible increases in the amount of damages recoverable, constitutionally permissible reductions in the amount of damages recoverable (both following a jury factual determination of the amount of damages) and constitutionally permissible eliminations of remedies all together. As a consequence, defendant-appellee contends that a correct statement of the controlling rules are that:

- “(1) The Legislature has the power to alter, amend or even abrogate both common law and statutory law.
- (2) That power necessarily includes the power to set limits on the recoverable damages in causes of action which

the Legislature chooses to recognize or chooses to continue to recognize.

- (3) The greater legislative power, i.e., the power to abrogate a cause of action completely, necessarily encompasses the lesser-included legislative power, the power to limit recoverable damages.”

## ARGUMENT

**MCLA 257.401(3); MSA 9.2101(3) CONSTITUTES A VALID AND LEGITIMATE EXERCISE BY THE LEGISLATURE OF ITS POLICE POWER, DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY, EQUAL PROTECTION, OR DUE PROCESS PROVISIONS OF THE MICHIGAN CONSTITUTION AND, AS SUCH, IS CONSTITUTIONAL.**

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**A. The presumption of constitutionality and the burden of proof.**

In reviewing the issues presented on appeal, the analysis necessarily begins with the presumption that the legislation is constitutional. *Caterpillar v Department of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992); *TIG Insurance Co, Inc v Department of Treasury*, 464 Mich 548, 557; 629 NW2d 402 (2001). “Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution, that a court will refuse to sustain its validity.” *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Since statutes are presumed constitutional, courts have a duty to construe statutes as constitutional unless unconstitutionality is clearly apparent. *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997).

The party asserting the constitutional challenge has the burden of proving the law's invalidity.<sup>5</sup> *In re Hamlet (After Remand)*, 225 Mich App 505, 521-522; 571 NW2d 750 (1997); *Brown v Siang*, 107 Mich App 91, 97; 309 NW2d 575 (1981). The power to declare a law unconstitutional should be exercised with extreme caution. *Thayer v Department of Agriculture*, 323 Mich 403, 413; 35 NW2d 360 (1949).

**B. Police power.**

The governmental authority known as police power is an attribute of state sovereignty and includes the power of legislation which is deemed essential for the protection of public peace, good order, morals, safety and health. *Locke v Ionia Circuit Judge*, 184 Mich 535, 539; 151 NW 623 (1915); *Clements v McCabe*, 210 Mich 207; 177 NW 722 (1920).

The Owners' Liability Statute represents an exercise by the Legislature of the police power. *Miller v Board of Road Commissioners of Manistee County*, 297 Mich 487, 493; 298 NW 105 (1941). The police power is elastic in nature, changing shape as

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<sup>5</sup> The normal presumption of constitutionality, with its attendant burden of proof on the party alleging unconstitutionality is inverted and the burden to establish constitutionality is placed on the defendant when, but only when, a fundamental right is burdened, restricted or interfered with. *Kropf v City of Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974); *Dunn v Blumstein*, 405 US 330, 343; 92 S Ct 995, 1003; 31 L Ed 2d 274 (1972). The inverted rule does not apply merely because an allegation is made that a fundamental right has been restricted or burdened. See, for example, *Wysocki v Kivi*, 248 Mich 346; 639 NW2d 572 (2001), involving various constitutional challenges to MCLA 600.2955a and *Richland Bookmark, Inc v Nichols*, 278 F 3570 (6<sup>th</sup> Cir 2002). As will be shown *infra*, MCLA 257.401(3) does not interfere with, burden or restrict any fundamental right.

varying social conditions demand correction. *People v Sell*, 310 Mich 305, 315, 316; 17 NW2d 193 (1945); *People v Brazee*, 183 Mich 259, 262; 149 NW 1053 (1914); *People v Raub*, 9 Mich App 114, 119; 155 NW2d 878 (1967).

**C. Trial by jury.**

**1. The scope of the right to trial by jury.**

The arguments set forth by plaintiff concerning the right to trial by jury as set forth on pages 5-11 of her brief overlook and omit the first step in the analysis which must be to determine the scope of the right to a trial by jury. Plaintiff presupposes that the right to trial by jury includes two components: (1) the right of the jury to determine the facts with respect to the amount of damages sustained and (2) the right of the jury to dictate the legal consequences of its factual determination. Well, it simply does not. The function of the jury extends solely to findings of fact and not to questions of law or public policy. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 589-601; 513 NW2d 773 (1994); *Buckley v Gibbs*, 321 Mich 367, 370; 32 NW2d 483 (1948); *Tull v United States*, 482 US 412; 107 S Ct 1831; 95 L Ed 2d 365 (1987); *Heinz v Chicago Road Investment Co*, 216 Mich App 289; 549 NW2d 47 (1996), *lv denied* 455 Mich 865; 567 NW2d 250 (1997) (trial court erred in failing to deduct from the jury verdict collateral source

benefits received by the plaintiff).<sup>6</sup>

The core element of the right to jury trial is the right to present a claim to the jury, and to have the jury determine issues of fact. *Great Lakes Gas Transmission v Marco*, 226 Mich App 127, 132; 573 NW2d 61 (1997); *Vandenburg v Kaat*, 252 Mich 187; 233 NW2d 220 (1930). It is a basic premise of our jury system that the Court states the law to the jury and that the judge applies that law to the facts as the jury finds them. *People v Lewis*, 6 Mich App 447, 454; 149 NW2d 457 (1967). The right to jury trial is the right to have issues of fact tried to, and decided by juries. *Romero v King*, 368 Mich 45; 117

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<sup>6</sup> In *Bair v Peck*, 248 Kan 824, 811 P2d 1176 (Ks 1991), the Supreme Court of Kansas was faced with a statute which abolished vicarious liability of medical providers for the active negligence of other physicians. The Court observed as follows:

“Nothing in the statute limits the jury’s right to determine the full amount of damages due the injured plaintiff and nothing limits the jury’s right to assess the full amount of such damage against the actual tortfeasor. Likewise, nothing in the statute limits the plaintiff who recovers such a judgment from resorting to every legal means available to collect the full amount of the judgment from the tortfeasor. The elimination of the vicarious liability of the non negligent employer has no effect whatsoever upon the jury’s factual determinations of the amount of damages or the extent of the liability of the negligent health care provider. ... The duty of the jury is to determine liability and determine the amount of damages suffered. It has nothing to do with the collection of the damages.” 811 P2d at 1186.

As in *Bair*, the jury in the present case determined the liability of the active tortfeasor, Da-Fel Reed, and the amount of damages sustained by the plaintiff. That exercise is not a nullity, because MCL 257.401(3) does not limit plaintiff in pursuing the full amount of the verdict against the active tortfeasor. As the Kansas Supreme Court stated:

“The constitutional right to trial by jury does not guarantee that every jury damage award will be collectible or guarantee any source for payment of such an award.”

NW2d 119 (1962). The jury's role is to decide questions of material fact. *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475, 484 (1994).

In *Tull v United States*, 482 US 412; 107 S Ct 1831; 95 L Ed 2d 365 (1987), the United States Supreme Court noted that nothing in the Seventh Amendment, the federal constitutional provision setting forth the right to trial by jury, suggests that the right to a jury trial extends to the remedy phase of a civil trial. The Supreme Court reasoned that the determination of the remedy in a civil trial could not be said to involve the substance of a common law right to a trial by jury nor a fundamental element of a jury trial. Justice Stevens noted in his concurrence to *Gasperini v Center for Humanities*, 518 US 415; 116 S Ct 2211, 2227; 135 L Ed 2d 659 (1996) that:

“It is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence or because an award of damages is larger than permitted by law.” (Underlining supplied).

The Maryland Court of Appeals, Maryland's highest court, relied on this principle in upholding a damage cap in *Murphy v Edmonds*, 325 Md 342; 601 A2d 102 (1992). Plaintiffs claimed that a \$350,000 cap on noneconomic damages in personal injury actions violated their right to a jury trial under Maryland's Declaration of Rights because it interfered with the jury's ability properly to determine damages and with the jury's exclusive province in determining factual issues. The Court disagreed, stating:

“[T]he jury trial right in civil cases relates to ‘issues of fact’ in legal actions. It does not extend to issues of law, equitable

issues, or matters which historically were resolved by the judge rather than by the jury.

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Moreover, the constitutional right to a jury trial is concerned with whether the court or the jury shall decide those issues which are to be resolved in a judicial proceeding.

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Where, however, the [legislature] has provided that a matter shall not be resolved in a judicial proceeding, by legislatively abrogating or modifying a cause of action, no question concerning the right to a jury trial arises. Since, under such circumstances, the matter will not be resolved in a judicial proceeding, the question as to whether a judge or a jury shall resolve the matter simply does not arise.” *Id.* at 371-72.

In *Boyd v Bulala*, 877 F2d 1191 (4<sup>th</sup> Cir 1989), the Fourth Circuit reversed the district court’s judgment that Virginia’s cap on recovery in an action for medical malpractice unconstitutionally denied plaintiffs their right to a jury trial. The Fourth Circuit agreed with the district court that the role of the jury is to determine the facts, but nonetheless upheld the damage cap stating:

“[I]t is not the role of the jury to determine the legal consequences of its factual findings . . . That is a matter for legislature, and here, the Virginia legislature has decided that as a matter of law damages in excess of \$750,000 are not relevant. In doing so it has not violated the Seventh Amendment.” *Id.*, 877 F2d at 1196.

In *Etheridge v Medical Center Hospitals*, 237 Va 87; 376 SE2d 525 (1989) the Supreme Court of Virginia, in upholding a statute limiting the amount of damages which may be received in a medical malpractice action against a constitutional challenge, stated “Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment.”

*Etheridge, supra* at p 529. In *Franklin v Mazda Motor Corp*, 704 F Supp 1325 (D Md 1989), the Court held that “a legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases in not acting as a factfinder in a legal controversy . . . The right of jury trials in cases at law is not impacted.” *Franklin, supra* at p 1331 (underlining supplied). See also *Madison v IBP, Inc*, 257 F3d 780, 804 (8<sup>th</sup> Cir 2001) where the Court explained:

“Congress created the Title VII cause of action and has the power to set limits for recovery under it. The statute does not violate the Seventh Amendment because it does not impinge upon the jury’s factfinding function. In applying a provision, a court does not ‘reexamine’ the jury’s verdict or impose its own factual determination as to what a proper award might be. Rather, it implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress.”

To be sure, plaintiff has cited *Rouse v Gross*, 357 Mich 475, 481; 98 NW2d 562 (1959) for the proposition that a trial by jury includes both the rendering of a verdict and giving effect to that verdict. It does not stand for that proposition. The statement from *Rouse, supra*:

“The right of trial by jury ordinarily refers to a right to present or defend an actionable claim to one jury to the point of jury verdict and judgment.”

was made in the context of determining that a party was entitled to one trial, not two, and, therefore, was not entitled to a new trial. *Rouse* has nothing whatsoever to do with the issues of whether the right to trial by jury extends to the right to dictate the legal consequences of factual determinations.

MIRAC contends that the reasoning of these cases applies here. Under MCLA 257.401(3), a plaintiff is permitted to present his or her full case to the jury and is entitled to have the jury determine the facts of the case based on the evidence presented. The jury is free to, and does, make all factual determinations relevant to the case. Once those factual determinations have been made, and the jury has fulfilled its constitutional role, the judge then applies the law to the facts as determined by the jury. All that a plaintiff is constitutionally entitled to is the right to present evidence and have the jury make factual determinations based on that evidence. The legal consequences and effect of a jury's verdict are matters for the Legislature, by enacting laws, and for the Courts, by applying the laws enacted by the Legislature, to the facts as determined by the jury.

So, to the extent that the plaintiff argues that MCLA 257.401(3) violates the second putative "right" set forth above, the arguments have no analytical support. They fall just as a house of cards does when its foundation is removed.

## **2. The authority of the Legislature.**

### **a. Overview.**

MCLA 257.401(3); MSA 9.2101(3) does not violate the right to a jury trial because the legislature clearly has the authority to abolish or modify rights and remedies, whether common law based or statutorily based. Because the limitation on damages imposed by MCLA 257.401(3) is simply a modification of a prior statutory remedy, the statute is within the constitutional authority of the Michigan legislature.

b. Analysis.

The Legislature has the power to abolish<sup>7</sup> or modify both common law and statutory rights. Indeed, that power is of constitutional dimension.<sup>8</sup> Const 1963, Art 3 §7 provides:

“The common law and the state law is now in force . . . shall remain in force until . . . they are changed, amended or repealed.”

Where the Legislature has acted to create a right, it can also act to restrict that right. A statutory right is not a vested right and holder thereof may be deprived of it.

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<sup>7</sup> Plaintiff acknowledges the Legislature’s “. . . power to altogether abrogate a cause of action . . . (Plaintiff’s Brief, p 12), but argues that the greater power does not include within it the lesser power to permit a statutory cause of action to continue to exist but simply limit the amount of damages recoverable thereunder. Plaintiff’s argument is simply illogical. See generally *Huron-Clinton Metropolitan Authority v Attorney General*, 146 Mich App 79; 379 NW2d 474 (1985) characterizing as illogical the argument that the plaintiff’s “greater” power to convey fee simple title to park land did not include the “lesser” power to convey a leasehold.

<sup>8</sup> As declared by this Court in the *Shavers v Attorney General*, 402 Mich 554, 612 n36 (1978), in upholding the constitutionality of the automobile no-fault act’s modification of tort remedies:

“Our constitution does not recognize a vested right in the continuance of existing remedies for injuries not yet suffered. Article 3, section 7 of our Constitution states that ‘the common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended, or repealed.’ Const 1963, Art III, section 7. As this Court stated in *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8, 13; 153 NW2d 49 (1915): ‘Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies. Common and statute law only remain in force until altered or repealed.’”

*Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959); *Bejger v Zawadzki*, 252 Mich 14; 232 NW 746 (1930). That which the Legislature gives it may take away. *Ramsey v Michigan Underground Storage Tank Financial Assurance Policy Board*, 210 Mich App 267, 270; 533 NW2d 4 (1995).<sup>9</sup>

Consistent with this power, the Legislature has eliminated the liability of defendants in certain personal injury cases involving governmental entities, *see* MCLA 691.1407; MSA 3.996(107) (the governmental immunity statute), involving employment, *see* MCLA 418.131; MSA 17.273(131) (the exclusive remedy provision) and involving long term motor vehicle lessors, *see* MCLA 257.401(2); MSA 9.2101(2).<sup>10</sup>

Since the Legislature can abolish statutory and common law rights, it therefore has the power to limit the remedies available for a cause of action. The analytical and logical error in the circuit judge's reasoning appears at page 5 of the April 26, 2000 opinion. Judge Borrello found that "the Legislature could [constitutionally] completely eliminate Owner's liability . . . . But could not constitutionally limit Owner's liability "because

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<sup>9</sup> Even though the right involved in this case is a statutory right and not a common law right, the analysis is the same in either context. A common law right of action may be abrogated by the Legislature. *Kaiser v North*, 292 Mich 49; 289 NW 325 (1940). The Legislature is always free to change the common law and indeed has express constitutional authority to do so. *Donajkowski v Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999); *Myers v Genesee County Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965).

<sup>10</sup> Prior to 1988, the Michigan Legislature "gave" unlimited liability under MCLA 257.401 to persons injured by vehicles driven by both long term and short term lessees. In 1988, the Legislature eliminated the statutory vicarious liability of long term vehicle lessors. MCLA 257.401(2). No valid constitutional challenge exists with respect to MCLA 257.401(2).

such a limitation impedes the constitutional right to a jury trial.” According to Judge Borrello, the more drastic action by the Legislature, *vis-à-vis* an injured person’s ability to recover damages against the owner of a motor vehicle of eliminating the statutory cause of action, is constitutional but the less drastic action of simply limiting recovery is not.<sup>11</sup> No logic supports this conclusion. The greater legislative power, *i.e.*, abrogating causes of action completely, includes the lesser legislative power, *i.e.*, capping recoverable damages. *See, e.g., Mountain Timber Co v State of Washington*, 243 US 219 37 S Ct 260; 61 L Ed 685 (1917)<sup>12</sup>

This is precisely the conclusion reached by the Courts in *Franklin v Mazda Motor Corp, supra*, and *Boyd v Bulala, supra*. The Courts in both cases concluded that since the Legislature could abolish a cause of action, of necessity, it had the power to limit the damages recoverable for the cause of action. “. . . [I]f the Legislature can act within its proper sphere of authority and completely eliminate a cause of action for negligence or repeal whole categories of recoverable damages under recognized torts, then it must follow that the Legislature has the power to define causes of action and limit categories

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<sup>11</sup> This is like saying that once you tell your teenager that he can go out at night with his friends (and thereby exercise his fundamental right of freedom of association) you can’t tell him to be in at 10:00 pm – but can only rescind or eliminate his ability to go out and associate entirely. The analogy is an apt one and shows the absurdity of the argument advanced by plaintiff and adopted by the circuit court judge.

<sup>12</sup> Plaintiff’s rights under the Michigan Constitution essentially track those guaranteed by the United States Constitution. *See United States v Lucas*, 203 F3d 964 (6<sup>th</sup> Cir 2000).

of recoverable damages for reasonable policy consideration . . .” *Franklin v Mazda Motor Corp, supra* at p 133.

Just recently the Supreme Court of Nebraska agreed with each of the arguments advanced by the defendant here in concluding that a statutory cap on damages does not violate the right to a jury trial. *Gourley v Nebraska Methodist Health System, Inc*, 265 Neb 918; 663 NW2d 43 (2003). That Court stated:

“The primary function of a jury has always been factfinding, which includes a determination of a plaintiff’s damages. . . . The court, however, applies the law to the facts. . . . Section 44-2825 provides the remedy in a medical malpractice action. The remedy is a question of law, not fact, and is not a matter to be decided by the jury. . . . Instead, the trial court applies the remedy’s limitation only after the jury has fulfilled its factfinding function. . . .

Further, as we have discussed, the Legislature has the right to completely abolish a common-law cause of action. . . . If the legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action. . . . We conclude that §44-2825 does not violate the right to a jury trial.” *Gourley, supra* 265 Neb at pp 953-954.

The Florida Court of Appeals also agreed with the arguments advanced by the defendant here in *Enterprise Leasing Co v Hughes*, 833 So2d 832 (Fla App 2002) *rev den* 203 Fla LEXUS 1273 (2003). There, the Court upheld the constitutionality of a Florida statute that limits damages recoverable for the vicarious liability of rental car lessors.<sup>13</sup> The plaintiffs there died from injuries received in an accident that occurred when the

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<sup>13</sup> The statute is Fla Stat ch 324.021 (2000).

driver of a leased motor vehicle crossed the centerline and collided with their vehicle. In the subsequent action, the defendant auto leasing company moved to limit damages to the amount established by the statutory cap. Plaintiff argued that the cap was unconstitutional as a denial of access to the courts, the right to a jury trial, equal protection, and due process. The Florida Appeals Court disagreed. The Court said:

“This section merely limits the liability of short-term lessors. It does not preclude an individual suffering from injuries arising from a vehicle accident from suing the lessee or operator of the vehicle. The statute reduces responsibility for damages arising from the fault of others but preserves full liability for compensatory damages caused by one’s own fault. The statute merely caps the amount of damages for the vicarious liability of the lessor. A plaintiff can always recover additional damages from the lessee or operator.” 833 So2d at 838.

With respect to the jury trial right, the Court noted that the “jury still retains the ability to fully assess all damages against those at fault.” Applying the rational basis test to the equal protection and due process challenges, the Court rejected the notion that the statute “discriminate[s] against plaintiffs suffering the worst injuries” or that it arbitrarily limits the liability of car and truck rental companies, but not the liability of other businesses which rent or lend vehicles. The Court explained:

“This section is rationally related to a legitimate legislative purpose. Through Chapter 99-225, the Legislature sought to shift some of the responsibility for damages due to the operation of the motor vehicle from the owner of a motor vehicle to the operator/lessee of the vehicle in short term leases. *See* H.R. Comm. on Judiciary, Analysis of HB 775. The statute shifts more of the liability to the actual tortfeasor.” 833 So2d at 839.

MIRAC contends that a similar logical rationale, and result, applies here.

There is no logical reason why a statutory limitation on a plaintiff's remedy is any different than any other permissible restriction on the ability of a plaintiff to recover in tort actions. MIRAC contends that the Legislature, if it had chosen in 1995, could have eliminated the statutory vicarious liability of short term vehicle lessors just as it had eliminated the statutory vicarious liability of long term vehicle lessors in 1988. Since the Legislature had the right to eliminate the statutory vicarious liability of short term vehicle lessors, it of course had the right to merely limit that liability.

c. **The multiple damages paradox.**

To the extent that the plaintiff argues, and the circuit court judge agreed, that any statutory modification of jury awards unconstitutionally violates the right to trial by jury, that argument has absolutely no merit. If a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as factfinder? Michigan has at least 30 statutes providing for double and treble in certain civil actions. See Stockmeyer, *Michigan Law of Damages (Second Edition)* §25.1 *et seq* where those statutes are collected.<sup>14</sup> Multiple damages statutes have been held constitutional. See, e.g., *Lane v Ruhl*, 103 Mich 38; 61 NW 347 (1894); *Shepard v Gates*, 50 Mich 495; 15 NW 878

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<sup>14</sup> “. . . [A]wards of double or treble damages authorized by statute date back to the 13<sup>th</sup> Century . . . and the doctrine was expressly recognized in cases as earlier as 1763.” *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc*, 492 U.S. 257, 274; 109 S Ct 2909; 106 L Ed 2d 219 (1989).

(1883). Clearly, the Constitution permits laws modifying jury awards. While the numerous multiple damages statutes all increase the damages recoverable from a defendant, rather than reducing recoverable damages as MCLA 257.401(3) does, it must be conceded that they nevertheless do modify a jury's factual determination of damages. The very existence of these statutes demonstrates the propriety of a legislative alteration of the amount of damages which may be recovered.

**3. The Michigan Constitution does not say that the right to trial by jury shall remain inviolate and hasn't said so since 1850.**

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Plaintiff concedes, as she must, that the ownership liability statute was first enacted prior to 1963. She asserts that the controlling Michigan Constitution is that of 1963. She then says:

“Since the Constitution 1963 declared the right of jury trial in civil cases if demanded, this right must be preserved inviolate.” (Plaintiff's Brief, p 12).

It is a clever play on words but plaintiff overlooks the fact that the word “inviolate” does not appear in Article 1, §14 of the Michigan Constitution of 1963, the constitutional provision at issue here.<sup>15</sup>

In fact, the word “inviolate” was removed from the Constitution in 1850.

Specifically, in 1835, the first Michigan Constitution stated:

“The right of trial by jury shall remain inviolate.”  
Constitution of 1835, Article 1, ¶9.

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<sup>15</sup> The term “inviolate” only appears in MCR 2.508(A).

In 1850, the Michigan Legislature adopted the following constitutional language:

“The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such a manner as shall be prescribed by law.”  
Michigan Constitution of 1850, Article 6, ¶27.

This language was preserved in the Constitution of 1908, Article 2, ¶13 and in the current Michigan Constitution, adopted in 1963. In light of the above, any significance plaintiff chooses to place on the term “inviolate” is unwarranted since that word was eliminated from the Michigan Constitution (with respect to the right to trial by jury) nearly 60 years before the first ownership liability statute was enacted.

Any reliance plaintiff chooses to place on MCR 2.508(A) is also misplaced. The court rule, by its own terms, deals with the “right to trial by jury as declared by the Constitution . . .” (underlining supplied). The court rule does not bestow any greater jury trial rights than those set forth in the Constitution. Nor, could it. Under Const 1963, Art 6, §5, this Court is given exclusive authority to promulgate rules governing practice and procedure in Michigan courts. At the same time, it is clear that this Court is not authorized to enact court rules that establish or modify the substantive law. *Shannon v Ottawa Circuit Judge*, 245 Mich 220, 223; 222 NW 168 (1928). Thus, this court rule in question cannot broaden the right to trial by jury as set forth in the Constitution.

**4. Cases from other jurisdictions cited by plaintiff.**

Plaintiff has cited various cases from other jurisdictions in an attempt to bolster her argument concerning the right to trial by jury. That attempt fails.

Plaintiff cites a trilogy of Alabama cases, *Moore v Mobile Infirmary Assoc*, 592 So2d 156 (Ala 1991); *Henderson v Alabama Power Co*, 627 So2d 878 (Ala 1993) and *Smith v Schulte*, 671 So2d 1334 (Ala 1995) for the proposition that a statutory damages limitation violates the right to jury trial. However, all of those Opinions were issued with vigorous dissents. In fact, in April, 1999, the Alabama Supreme Court clearly signaled that on the next available opportunity it will reverse its course on the constitutionality of damages limitations. *Goodyear Tire & Rubber Co v Yinson*, 749 So2d 393 (Ala 1999). Alabama is reversing course.<sup>16</sup>

*Henderson v Alabama Power Co*, *supra* and *Smith v Schulte*, *supra*, both hold that the constitutional right to trial by jury encompasses the assessment of punishment. The Supreme Court of Alabama reversed and abrogated those cases, insofar as the principle was applied to criminal cases, in *In Re Apicella*, 809 So2d 865 (2001) holding that the constitutionally protected right to trial by jury did not encompass the determination of punishment, *i.e.*, the legal consequence of a factual determination. That Court declined to rule on the issue in the civil context in *Horton Homes, Inc v Brooks*, 832 So2d 44 (2001) because the issue, although raised by the defendant in the trial court, was not argued on appeal.

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<sup>16</sup> In any event, the Alabama cases can be distinguished because, unlike Michigan statutory ownership liability, all Alabama cases dealt with common law causes of action, not one created by the Alabama legislature to begin with, and then limited by that same legislature. Furthermore, the Alabama constitutional provision at issue, unlike the Michigan constitutional provision at issue here, stated that “the right to trial by jury shall remain inviolate.”

Plaintiff cites *Sofie v Fiberboard Corp*, 771 P2d 711 (Wash 1989) where the Court held that the limitation on non-economic damages in a products liability case violated the right to jury trial under the Constitution of the State of Washington. The *Sofie* court held that the right to jury trial attaches only to actions which were available at the common law at the time the right to jury trial was adopted by the Constitution, or actions created by statutes which were in force at that time (771 P2d at 718). Here, the current constitutional language regarding the right to jury trial in Michigan was initially adopted in 1850, and the ownership liability statute was not enacted until 1909. Clearly, at the time the right to jury trial was adopted, there was no statutory ownership liability.

Moreover, although arguably *Sofie* stands for the proposition that in Washington a legislature may not take away common law causes of action,<sup>17</sup> such as products and medical malpractice causes of action, ownership liability is a cause of action created by the legislature to begin with. In Michigan, that which the legislature enacts, it also may take away. See *Lahti v Fosterling*, *supra*.

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<sup>17</sup> Plaintiff also cites *Kansas Malpractice Victims Coalition v Bell*, 243 Kan 333 (1988). That case also dealt with a common law cause of action, not statutory ownership liability. The Kansas Supreme Court recognized this distinction in *Leiker v Gafford*, 245 Kan 325, 778 P2d 823 (1989), in which the Court specifically limited its holding in *Bell* to common law causes of action. See also *Lakin v Senco Products*, 987 P2d 463 (Or 1999); *State ex rel Ohio Academy of Trial Lawyers v Sheward*, 715 NE2d 1062 (Ohio 1999); *Hipp v Liberty Nat'l Life Ins Co*, 39 F Supp 2d 1359 (MD Fla 1999); *Bailey v Unocal Corp*, 700 F Supp 396 (ND Ill 1988), all distinguishing between common law causes of action and statutory causes of action.

For all these reasons, the necessary conclusion is that MCLA 257.401(3) does not violate the right to jury trial as guaranteed by Const 1963, Art 1, §14.<sup>18</sup>

**D. Equal protection.**

The equal protection guarantee in the Michigan Constitution, Const 1963 Art 1, §2, requires that persons under similar circumstances be treated alike. *El Souri v Department of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987); *Doe v Department of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992). The standard to be applied in order to determine the constitutionality of a statute, when an equal protection violation has been alleged, depends upon the classification scheme of the challenged legislation. *Doe, supra* at p 662.

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<sup>18</sup> The Supreme Courts in other states, including Indiana, Missouri, Nevada and Utah, as well as other federal courts, also have upheld damage caps under their respective state or federal constitutional provisions guaranteeing a right to a jury trial. *Johnson v St Vincent Hosp*, 273 Ind 374, 400-401; 404 NE2d 585 (1980) (damages cap did not violate constitutional right to jury trial by removing determination of damages in excess of statutory amount from the jury; Indiana's Constitution provides that "in all civil cases, the right of trial by jury shall "remain inviolate." *Id.* at 383); *Adams v Children's Mercy Hosp*, 832 SW2d 898 (Mo 1992) (damage cap does not violate Missouri's constitutional guarantee to a jury trial; Missouri Constitution provides that the right to a jury trial "shall remain inviolate."); *Arnesano v Nevada*, 113 Nev 815; 942 P2d 139, 142 (1997) ("while it is the jury's role as factfinder to determine the extent of a plaintiff's injuries, 'it is not the role of the jury to determine the legal consequences of its factual findings . . . ' Hence, the statutory cap does not violate appellants' rights to a jury trial"); *Davis v Omitowojo*, 883 F2d 1155, 1162 (3<sup>rd</sup> Cir 1989) (Seventh Amendment did not prevent court in medical malpractice case from reducing jury's award in accordance with statutory cap; court was implementing policy decision that legislature was not constitutionally prohibited from making); *Parks v Utah Transit Authority*, 449 Utah Adv Rep 12; 2002 WL1301656 (2002) (statutory damages cap does not violate the right to a jury trial provision in the Utah Constitution).

Strict scrutiny of a legislative classification is required “only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998), quoting *Massachusetts Board of Regents v Murgia*, 427 US 307, 312; 96 S Ct 2562, 49 L Ed 2d 529 (1976); *Harvey v State of Michigan, Department of Management and Budget, Bureau of Retirement Services*, \_\_ Mich \_\_; 664 NW2d 767, 773 (2003) (“unless the discrimination impinges on the exercise of a fundamental right . . . , the inquiry . . . is whether the classification is rationally related to a legitimate governmental purpose.”), quoting *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996).

In *Stevenson v Reese*, 239 Mich App 513; 609 NW2d 195 (2000) the Court of Appeals declined to utilize a heightened level of scrutiny even though a fundamental right, the right of access to the court system, was involved because the statute in question did not “. . . impermissibly burden the right of access to the courts.” See also *Citizens for Uniform Taxation v Northport Public School District*, 239 Mich App 284; 608 NW2d 480 (2000) and *Wysocki v Kivi*, 248 Mich App 346; 639 NW2d 572 (2002) where the Court declined to use a heightened level of scrutiny even though the right to trial by jury was involved in the case.

To simply say that the strict scrutiny standard applies whenever the right to trial by jury is involved is not accurate. To argue that the normal presumption of constitutionality (with its attendant burden of proof on the party alleging

unconstitutionality) is inverted<sup>19</sup> and that the strict scrutiny standard applies simply and solely because the right to a trial by jury is involved is simply a facile way of circumventing the foundational conclusion that the constitutional right to a trial by jury is not violated by the limitation of remedy set forth in MCLA 257.401(3). It is when, and only when, a statute impermissibly interferes (other cases use the verbs “burden” “infringe,” and “impinge”) with the exercise of a fundamental right, *Vargo v Sauer*, *supra* at p 60 that the strict scrutiny standard comes into play.

In order to determine whether a fundamental right has been impermissibly infringed, one must first determine the scope of nature of that right. In *Department of Housing and Urban Development v Rucker*, 535 US 125, 136, n6; 122 S Ct 1230; 152 L Ed 2d 258 (2002), the United States Supreme Court acknowledged that the rational basis test applied in order to determine the constitutionality of a statute authorizing the eviction from public housing for unknown drug-related activity of third parties despite the fact that the fundamental First and Fourteenth Amendment right to freedom of association was involved or implicated. The Supreme Court recognized that you have to, at the outset, determine the scope of the asserted fundamental right because only then can you determine if the legislative act interferes with or burdens that right. If it doesn’t, the strict scrutiny test does not apply and the rational basis test does.

An example best illustrates this point. If one’s fundamental right to travel consists of the right to travel anywhere in the United States, a statute that says you cannot travel

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<sup>19</sup> See footnote 5, *supra*.

outside Michigan impermissibly interferes with that right. But, if, on the other hand, one's fundamental right to travel extends only to Michigan's boundaries, a statute that says you can't travel outside Michigan, while concededly involving the right to travel, does not impermissibly interfere with that right. Clearly, one has to define the scope of the right involved in order to determine if a statute interferes with that right.

The discussion set forth under subsection C above, demonstrates that legislative limitations on the extent of recovery of damages generally do not violate the constitutional right to trial by jury. The question presented now is whether the particular limitation on the extent of recovery of damages set forth in MCLA 257.401(3) is otherwise constitutional. In order to answer that question one must just acknowledge the right which is being asserted. This question must be answered by application of the rational basis standard.

The asserted right actually involved in this case is the right to recover damages for personal injuries. This is not a fundamental right and, for that reason, the strict scrutiny standard of review does not apply. The right to recover damages in tort is not a fundamental right for purposes of either an equal protection or due process analysis. *Duke Power Co v Carolina Environmental Study Group*, 438 US 59, 82-84; 98 S Ct 2620; 57 L Ed 2d 595 (1978); *Garcia v Wyeth-Ayers Laboratories*, 265 F Supp 2d 825, 834 (ED Mich 2003); *Wysocki v Kivi, supra*. Other state appellate courts which have considered the issue have reached the same conclusion. *Gourley v Nebraska Methodist Health System, Inc, supra*; *Guzman v St Francis Hospital, Inc*, 240 Wis 2d 559; 623 NW2d 776 (Wis App 2000); *American Bank & Trust Co v Community Hosp*, 33 Cal 3d

674; 190 Cal Rep 371; 660 P2d 829 (Cal 1983);<sup>20</sup> *Austin v Litbak*, 682 P2d 41 (Colo 1984); *Rodriguez v Schutt*, 896 P2d 881, 886 (Colo 1995) *aff'd in part, rev'd in part on other grounds*, 914 P2d 921 (Colo 1996); *Jones v State Board of Medicine*, 97 Idaho 859; 555 P2d 399 (1976) *cert den* 431 US 914; 97 S Ct 2173; 53 L Ed 2d 223 (1977); *Johnson v St Vincent Hosp, Inc*, 273 Ind 374; 404 NE2d 585 (1980); *State Ex Rel Strykowski v Wilkie*, 81 Wis 2d 491; 261 NW2d 434 (1978).

In the specific context of the federal statutory cap on damages in statutory sexual harassment cases imposed by 42 USC §1981a(b)(3)(A), the federal district court in *Means v Shyam Corp*, 44 F Supp 2d 129, 131 (DNH 1999) stated:

“The right of a sexual harassment victim to a recovery of more than \$50,000 in compensatory and punitive damages is not encompassed within the category of fundamental rights.”

The foregoing cases establish that the right to recover damages for personal injuries is not a fundamental right and, therefore, strict scrutiny does not apply. Nor does the intermediate, substantial relationship standard. In *Harvey, supra*, this Court just recently rejected application of the intermediate scrutiny test in the “discrete exception”

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<sup>20</sup> The cited decision was vacated and rehearing was granted. In the subsequent decision reported as *American Bank & Trust Co v Community Hosp*, 36 Cal 3d 359; 204 Cal Rptr 671; 683 P2d 670 (1984), the Supreme Court of California rejected various constitutional challenges to a state statute providing for the periodic payment of future damages in excess of \$50,000 and held that “. . . a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages.” 36 Cal 3d at p 368.

situation identified in *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 672; 232 NW2d 636 (1975).

The substantial relationship standard had been applied when “the challenged statute carves out a discrete exception to a general rule and the statutory exception is no longer experimental.” *Manistee Bank & Trust Co v McGowan*, *supra* at p 672. The Court of Appeals had recognized that the trend had been away from the substantial relationship standard for cases that do not involve fundamental rights or suspect classification. *Deepdale Memorial Gardens v Administrative Secretary of Cemetery Regulations*, 169 Mich App 705, 712; 426 NW2d 785 (1988). In this case, even if *Manistee Bank*, *supra*, had not been overruled, and even if MCLA 257.401(3) “carves out a discrete exception to the general rule” of statutory vicarious ownership liability, the statute is clearly experimental social or economic legislation<sup>21</sup> that is entitled to deference. *O’Brien v Hazelet & Erdal*, 410 Mich 1, 19-20; 299 NW2d 336 (1980); *Shavers v Attorney General*, 402 Mich 554, 613, n37; 267 NW2d 72 (1978). Accordingly, the intermediate scrutiny standard would not have applied. The rational basis standard does apply.

The majority of courts that have examined the constitutionality of statutory caps similar to the one challenged here have applied the rational basis standard, which requires the legislative classification to be rationally related to a legitimate governmental interest.

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<sup>21</sup> Economic legislation is a legislative effort to structure and accommodate the burdens and benefits of economic life. *Duke Power Co*, *supra*, 438 US at p 83.

For example, in *Adams v Children's Mercy Hosp*, 832 SW2d 898 (Mo 1992), *cert denied* 113 S Ct 511 (1992) the Supreme Court of Missouri, in analyzing an equal protection challenge to the constitutionality of a cap on noneconomic medical malpractice damages, found that the right to a jury trial was not a fundamental right subject to strict scrutiny. Instead, the court applied the rational basis standard. The statutory cap created a classification between a "health care provider," as defined in the statute, and other tortfeasors who might be involved in a negligence lawsuit. The court noted that although the exact purpose of the classification was somewhat uncertain:

"Under equal protection rational review, this doubt must be resolved in favor of the General Assembly. while some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists. Here, the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives that can be achieved, if only inefficiently, by the statutory provision under attack here." *Id.* at 904.

The court held that the statutory cap did not violate the equal protection clause because "the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Id.*

Similarly, in *Murphy v Edmonds, supra*, , plaintiffs claimed that a \$350,000 cap on noneconomic damages in personal injury actions violated Maryland's equal protection clause. Plaintiffs argued that the statutory cap created a "classification between less seriously injured tort plaintiffs who are entitled to keep everything the jury awards and more seriously injured tort plaintiffs who are not entitled to receive

noneconomic damages exceeding \$350,000,” and, as such, should be subject to a “heightened” degree of scrutiny. *Id.* at 355. The Court of Appeals of Maryland, Maryland’s highest court, rejected plaintiffs’ argument stating:

“In our view a legislative cap of \$350,000 upon the amount of noneconomic damages which can be awarded to a tort plaintiff does not implicate such an important ‘right’ as to trigger any enhanced scrutiny. Instead, the statute represents the type of economic regulation which has regularly been reviewed under the traditional rational basis test by this Court and by the Supreme Court.” *Id.* at 362.

The court then concluded that the statutory cap satisfied rational basis scrutiny:

“The General Assembly’s objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. This is obviously a legitimate legislative objective. A cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services. The cap, therefore, is reasonably related to a legitimate legislative objective.” *Id.* at 369-70.

Other courts applying the rational basis standard scrutiny to equal protection challenges to similar statutory damage caps include:

- Supreme Court of West Virginia in *Robinson v Charleston Area Medical Center*, 186 W Va 720; 414 SE2d 877 (1991) (\$1 Million cap on noneconomic damages in medical malpractice actions). Reaffirmed in *Verba v Ghaphery*, 210 W Va 30; 552 Se2d 406 (2001).
- Supreme Court of Virginia in *Etheridge v Medical Center Hosp*, 237 Va 87 (1989) (\$750,000 cap on damages in medical malpractice actions).

- Supreme Court of Indiana in *Johnson v St Vincent Hosp*, 273 Ind 374 (1980) (\$500,000 cap on damages in medical malpractice actions).
- Supreme Court of California in *Fein v Permanente Medical Group*, 38 Cal 3d 137; 695 P2d 665 (1985) (\$250,000 cap on noneconomic damages in medical malpractice actions).
- Supreme Court of Colorado in *Scholz v Metropolitan Pathologists*, 851 P2d 901 (Colo 1993) (\$250,000 cap on damages in medical malpractice actions). *See also, Stewart v Rice*, 25 P3d 1233 (Colo App 2000) *rev'd on other grounds* 47 P3d 316 (Colo 2002)) (statutory cap on noneconomic damages does not violate equal protection or due process under either the state or federal constitutions).
- Court of Appeals for the Fourth Circuit in *Boyd v Bulala*, 877 F2d 1191 (CA4 1989) (\$750,000 cap on damages in medical malpractice actions).
- Court of Appeals for the Third Circuit in *Davis v Omitowojo*, 883 F2d 1155 (3<sup>rd</sup> Cir 1989) (\$250,000 cap on damages in medical malpractice actions).
- Louisiana Court of Appeals in *Ruiz v Oniate*, 806 So2d 81 (2001) (\$500,000 statutory cap on damages in medical malpractice actions against public healthcare providers).

Under the traditional rational basis equal protection analysis, a legislative classification must be sustained if the classification is rationally related to a legitimate governmental interest. *Shavers v Attorney General*, *supra* at p 613 quoting *United States Department of Agriculture v Moreno*, 413 US 528, 533; 93 S Ct 2821; 37 L Ed 2d 782 (1973).

The core of plaintiff's equal protection (and by incorporation her due process) argument appears on pages 29 of her Brief where she says:

“Defendant argues that the legitimate purpose of MCLA §257.401(3); MSA §9.2101(3) was to ease a liability crisis involving the car rental business in Michigan. . . . Defendant argues that without the protection afforded the car rental

industry by MCLA §257.401(3); MSA §9.2101(3), car rental companies would pull out of the State, or in the alternative, car rentals would involve exorbitantly high costs. Again, NOTHING COULD BE FURTHER FROM THE TRUTH!”

As is evident, plaintiff wants this Court to conduct a “*de novo*” review of the evidence which supported the legislature’s decision to enact MCLA 257.401(3). Of course, this is not permitted.

In cases where the validity of a statute is attacked for want of equal protection, the Court does not consider whether the social facts, actually and in fact, support the statute but only whether the legislature had reasonable grounds for believing that they do. If an act of the legislature would be valid only in the event certain facts and circumstances exist, it is presumed that all such facts and circumstances do exist. *Alabama State Federation of Labor, Local No. 103 v McAdory*, 325 US 450; 65 S Ct 1384; 89 L Ed 1725 (1945); *People v Cooper (After Remand)*, 220 Mich App 368, 373; 559 NW2d 90 (1996) (a legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it). Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for legislature, the rule is that courts will acquiesce in the legislature’s determinations unless they are clearly erroneous, arbitrary or wholly unwarranted. *Smith v Command*, 231 Mich 409, 425; 204 NW 140 (1925).

A difference in treatment is constitutional if it is supported by facts that are known or could reasonably be assumed, even if those facts are debatable. *TIG Insurance Company, Inc v Department of Treasury*, *supra* at p 557; *Northwestern National Casualty*

*Co v Commissioner of Insurance*, 231 Mich App 483; 586 NW2d 563 (1998) citing *People v Sleet*, 193 Mich App 604, 606, 607; 484 NW2d 757 (1992). Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. See *FCC v Beach Communications, Inc*, 508 US 307, 313; 113 S Ct 2096; 124 L Ed 2d 211 (1993). “We do not sit ‘as a superlegislature to judge the wisdom or desirability of legislative policy determinations.’ We sit as a court to determine whether there is a rational bases for the Legislature’s judgment. If there is, then that judgment must be sustained.” *O’Donnell v State Farm Mutual Automobile Ins Co*, 404 Mich 524, 543; 273 NW2d 829 (1979); *Stevenson v Reese*, *supra*.

As the Court reasoned in *Adams v Children’s Mercy Hosp*, 832 SW2d 898, 904 (Mo 1992), *cert denied* 113 S Ct 511 (1992):

“Both sides offer an array of evidence that both supports and refutes the existence of a ‘crisis’ in medical malpractice premiums – enough evidence, in fact, that at the very least, it is a debatable proposition that such a crisis does in fact exist. Under equal protection rational review, this doubt must be resolved in favor of the General Assembly. While some clearly disagree with its conclusions, it is the province of the Legislature to determine socially and equally desirable policy and to determine whether a medical malpractice crisis exists.”

The same conclusion obtains here.

MIRAC contends that MCLA 257.401(3) is rationally related to legitimate governmental interests and, for that reason, the rational basis standard is met and satisfied. The legislative history underling MCLA 257.401(3) shows that the problem being addressed by the Legislature was the peculiarly acute impact which the owners’

liability statute had on the short term rental vehicle industry. That impact resulted in costs to members of the car and truck rental industry which some companies could not afford and which threatened their continued viability in Michigan. To remedy this serious demonstrated business problem for the vehicle rental industry and to ensure that rental companies could and would continue to do business in Michigan, the statute limited, but did not exempt, the liability of short term vehicle lessors. Surely, enabling persons who reside in Michigan and persons who travel to Michigan to rent vehicles on a short term basis is a legitimate legislative end.

It is clear that economic and social life in Michigan would be seriously and adversely affected by the absence of motor vehicle car rental opportunities in this State, or, alternatively, by the availability of rental cars only at exorbitantly high costs.

Generally, rental car customers fall into two categories, airport transactions and local transactions. The Michigan Vehicle Rental and Leasing Association (“MVLRA”)<sup>22</sup> estimated that in 1996-1997 of all rental transactions in the United States 53%-54% occurred at airports, 46%-47% locally. (Michigan data is not available). The airport rentals nationwide for the same period break down into approximately 54%-55% business rentals, 45%-46% leisure rentals. Most of the airport rentals are to out-of-state visitors. (Appellee’s Appendix at pp 4b-5b, contains data from which this information was extracted). Tourism is an important source of income in this State, and although the

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<sup>22</sup> The current name of the Michigan Vehicle Rental and Leasing Association is The Car and Truck Rental and Leasing Association of Michigan, Inc.

exact impact is difficult to quantify, the impact of fewer rental vehicles at higher costs can only be negative in that regard.

The second category identified above is the “local” market. Most of those renters are Michigan residents. This category generally is divided into three segments: business rentals, approximately 14%, leisure rentals, approximately 55%, and replacement vehicles for cars owned by residents which are temporarily out-of-service, approximately 31%. Assuming approximately 20,000 rental cars on Michigan roads, and assuming the national percentages are representative for Michigan, one may assume that daily approximately 1,500 Michigan residents rent a vehicle for business, approximately 5,000 rent a vehicle for leisure and approximately 3,000 rent a vehicle to replace a vehicle which is being repaired.

Indeed, it may be the last segment of renters which would be most severely impacted by higher costs or lack of availability altogether. Renters in this segment rent vehicles as a matter of necessity – their own vehicles are unavailable. If they are financially unable to afford the higher cost, they will be left without any vehicle. Additionally, it should be kept in mind that the entire second category is more heavily dependent on access to rental car facilities in their own neighborhoods than the out-of-state visitors. Even if airport rental facilities, which primarily serve out-of-state renters, were to continue their operations at higher costs, it is the continued availability of rental cars to Michigan residents which would be most severely impacted. This would include social visits to family and friends, visits to doctor’s offices, etc. These statistics do not include do-it-yourself movers, who make up 2/3 of rental trucks on Michigan roads.

Surely, enabling persons who reside in Michigan and persons who travel to Michigan to rent vehicles on a short term basis is a legitimate legislative goal.

The effect of MCLA 257.401(3) is to preserve the viability of the short term motor vehicle leasing industry in Michigan. A legitimate state interest is served by legislation designed to protect certain businesses from ruinously large awards. *Means v Syham Corp, supra* at p 133, citing *Duke Power Co*, 438 US at p 83 (“The Supreme Court, in an analogous case, has noted that when Congress strikes a balance between a victim’s right to recover noneconomic damages and society’s interest in protecting certain businesses from ruinously large awards, it is engaging in its fundamental role of structuring and accommodating the benefits of economic life”).

In *Roy v Rau Tavern, Inc*, 167 Mich App 664; 423 NW2d 54 (1988), a child was killed in a motorcycle accident after having been served alcohol by a bar. The parents of the child sought to hold the bar liable under the Dramshop Act.

Approximately 1½ months prior to the accident, the Legislature had enacted an amendment, which barred the visibly intoxicated person himself, as well as his parents, from maintaining a cause of action under the Dramshop Act. The parents claimed that such distinction violated the Equal Protection Clause.

Appropriately, the Court of Appeals first restated the “presumption of constitutionality” as meaning that the Court’s inquiry must be restricted to the issue of whether there was any state of facts, either known or which could reasonably be assumed, to support the statute. The Court went on to conclude that:

“The amendment does not deny plaintiffs the equal protection of the laws. The amendment was designed to deal with numerous cases which were creating a liability crisis for tavern and restaurant owners. Barring family members of a visibly intoxicated person from maintaining suit was one way in which this crisis could be lessened. We cannot conclude that this classification was arbitrary. It was rationally related to a legitimate governmental interest.” *Id.*

Just as limiting the liability exposure of actively-at-fault bars and restaurants is one way to deal with the perceived crisis in their business, limiting the vicarious ownership liability of short term vehicle rental companies is a rational way to deal with the perceived crisis in the motor vehicle rental industry. This is a permitted legislative goal. *See also, Neal v Oakwood Hosp Corp*, 226 Mich App 701; 575 NW2d 68 (1997) (The state unquestionably has a legitimate interest in preserving the availability and affordability of products and services to Michigan residents in the face of spiraling costs).

Inasmuch as the Legislature’s purpose was to protect the viability of the rental vehicle industry in Michigan, it is logical that any act which lowers the cost of obtaining rental vehicles and the cost of conducting the rental vehicles business in Michigan rationally furthers the legitimate purpose.

Furthermore, owners of motor vehicle rentals are in a peculiar situation compared to other motor vehicle owners. One may assume that any owner of a non-rental car generally is familiar with the person whom he/she hands the car keys to, and can use discretion in that regard. Because there is typically no economic quid pro quo, because such owners can easily say “no” and because such owners are familiar with the risk factors involved, the risk attendant to letting someone else use the car is limited and

knowingly assumed. Generally, motor vehicle rental companies do not have the same knowledge of or opportunity to investigate the risk. Their position is different than other motor vehicle owners.

In the lower court, plaintiff compared this case to the *Manistee* case and argued that the classification in this case is arbitrary, citing the example of two brothers who both sustained above threshold injury, one relatively minor, the other severe. Under plaintiff's example, one would be compensated completely, the other would be compensated only fractionally. Extending plaintiff's example, if one brother had received below threshold injuries and the other above threshold injuries, one brother would not be compensated at all, the other brother would be fully compensated. Yet, no Court has held that the establishment of a threshold violates the equal protection rights of a tort victim who cannot recover damages.

To the contrary, in *McKendrick v Petrucci*, 71 Mich App 200; 247 NW2d 349 (1976), the plaintiff challenged the injury threshold requirement for pain and suffering claims under the no-fault act. Plaintiff contended that the statute violated the equal protection clause because the Plaintiff had to have threshold injuries if a Defendant was insured, but could sue for pain and suffering regardless of threshold if the Defendant was uninsured. In rejecting this argument, the Court stated:

“In providing that the uninsured tortfeasor does not have the same immunity that exists when there is insurance coverage, the act creates another significant incentive towards the goal of insurance coverage for all automobiles.” *McKendrick*, 71 Mich App at 207.

Likewise, this Court, citing *McKendrick*, stated:

“The creation of two classes of accident victims . . . does not violate equal protection. This classification, along with penalties imposed by MCL 500.3102(2) may serve as an incentive for compliance with the compulsory insurance provision . . .” *Shavers v Kelley*, 402 Mich 554; 267 NW2d 72, 99 (1978).

Clearly, the mere fact that socio-economic legislation may have a detrimental impact on certain tort victims does not affect the legitimacy of its purpose, nor the rational basis between means and ends.

In *Kruger v South Oakland County Mutual Aid Pact*, 49 Mich App 7; 211 NW2d 228 (1973) *reversed on other grounds*, 399 Mich 835; 250 NW2d 67 (1977), a photographer was injured in an altercation with police officers. The city of Berkley, which employed the police officers, moved for summary judgment, arguing that the governmental immunity law shielded it from liability. In response, plaintiff asserted that the governmental immunity statute, MCL 691.1407, denied him the equal protection of the law. He argued that the statute arbitrarily and unreasonably discriminated by denying relief to victims of public tortfeasors while according relief to victims of private tortfeasors for the same tort. He argued that predicated a right to relief on public versus private identity of the tortfeasor strained logic. He asserted further that equal protection was denied by according relief to certain victims of public tortfeasors while denying it to others because the legislature employed no rational scheme to create exceptions. *See* 49 Mich App at 9-10.

Consistent with other case law, the Court of Appeals applied the “rational basis” test, stating that if a reasonable relation exists between the classification and some

legitimate state interest, no denial of equal protection results. Citing from *McGowan v Maryland*, 366 US 420, 81 S Ct 1101, 6 L Ed 2d 393 (1961) the court stated:

“Although no precise formula has been developed, the court has held that the 14<sup>th</sup> Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws resulted in some inequality. This statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” 49 Mich App at 12.

In *Shwary v Crane Trol Corp*, 88 Mich App 264; 276 NW2d 882 (1979), a plaintiff was injured on the job when he was struck by falling bars of steel. He filed a lawsuit against the workers’ compensation insurance carrier for his employer, arguing that the workers’ compensation insurer had conducted negligent safety inspections. The insurance carrier moved for summary judgment on the ground that the Workers Disability Compensation Act provides immunity from liability for damages for injury or death of an employee arising from any negligent safety inspections by the insurer. Plaintiff asserted that this immunity was in violation of the Equal Protection Clause.

Applying the “rational basis” standard, the Court concluded that the classification can be sustained if any state of facts reasonably can be conceived that would sustain it. 88 Mich App at 264. The Court concluded “a rational basis for the classification can be readily hypothesized; the legislature granted immunity to the carriers in order to encourage safety inspections.” 88 Mich App at 268-9. The Court did not inquire as to

whether or not the legislative choice was “the wisest of choices,” because that determination is properly a legislative prerogative. 88 Mich App at 269.

These cases show that just because a statute has a perceived unfair impact on some tort plaintiffs, such unfairness is not determinative for equal protection purposes.

In summary, this case involves a legitimate state interest, and a rational means to implement the purpose of the law. The liability – limitation provision at issue is simply a classic example of an economic regulation – a legislative effort to structure and accommodate “the burdens and benefits of economic life.” *Usery v Turner Elkhorn Mining Co*, 428 US 1, 15; 96 S Ct 2882, 2892; 49 L Ed 752 (1976). By striking the balance which it did between a tort victim’s right to recover damages from a non-negligent vicariously liable company engaged in the business of leasing motor vehicles and society’s interest in preserving the availability for lease of motor vehicles by Michigan residents and visitors to the state, the Legislature did no more than engage in the fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life. MCL 257.401(3) is well within the boundaries of the equal protection clause of the Michigan Constitution.

**E. Due process.**

To determine whether a statute violates due process, the inquiry is whether the statute bears a reasonable relation to a permissible legislative objective. *Neal v Oakwood Hosp Corp, supra*; *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997); *Katt v Insurance Bureau*, 200 Mich App 648, 651; 505 NW2d 37 (1993).

Michigan courts review substantive due process claims using substantially the same standard as is used to review equal protection claims. *Doe v Department of Social Services*, 439 Mich 650, 682 n36; 487 NW2d 166 (1992). For the reasons stated above in subsection D concerning the equal protection analysis, MIRAC contends that MCLA 257.401(3) bears a reasonable relation to a permissible legislative objective and, as such, does not violate the due process clause.

## CONCLUSION

Based upon the foregoing analyses and citations to authority, defendant-appellee, MIRAC, Inc., contends that MCLA 257.401(3); MSA 9.2101(3) does not violate the Michigan Constitutional provisions relating to the right to trial by jury, equal protection or due process and, as such, is constitutional. The Court of Appeals majority was correct. That decision should be affirmed.

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DATED: September 19, 2003

STATE OF MICHIGAN  
IN THE SUPREME COURT  
(ON APPEAL FROM THE COURT OF APPEALS)

MARGARET PHILLIPS, Personal Representative  
of the Estate of REGEANA DIANE HERVEY,  
Deceased,

Plaintiff-Appellant,

S.C. No. 121831

C.A. No. 227257

v

L.C. No. 98-23923-NI-5

MIRAC, INC., a Michigan Corporation,  
Jointly and Severally,

Defendant-Appellee,

and

DA-FEL REED.

Defendant.

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**CERTIFICATE OF SERVICE**

STATE OF MICHIGAN    )  
                                  ) ss.  
COUNTY OF WAYNE    )

Ernest R. Bazzana, being first duly sworn, deposes and says that he is a Partner with the firm of Plunkett & Cooney, P.C., and that on the 19<sup>th</sup> day of September, 2003, he caused to be served two copies of MIRAC, Inc.'s Brief on Appeal, Request for Oral Argument, and Certificate of Service upon the following:

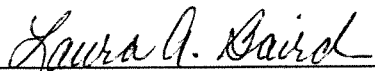
Nicholas R. Trogan, III, Esq.  
Trogan & Trogan, P.C.  
Attorney for Plaintiff-Appellant  
7628 Gratiot Road  
Saginaw, MI 48609

by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the

United States Mail.

  
\_\_\_\_\_  
ERNEST R. BAZZANA (P28442)

Subscribed and sworn to before  
me this 19<sup>th</sup> day of September, 2003.

  
\_\_\_\_\_  
Laura A. Baird, Notary Public  
St. Clair County, Michigan  
Acting in Wayne County, Michigan  
My Commission expires: 01/15/2004